CRAIG C. DOWNER

IBLA 88-678 Decided October 31, 1989

Appeal of a decision of the Nevada State Director, Bureau of Land Management, approving final plans for removal of excess wild horses. N 2-88-2.

Set aside and remanded.

1. Rules of Practice: Appeals: Timely Filing

An appeal will not be dismissed as untimely when the record fails to establish that the decision was served upon the appellant more than 30 days prior to the date the notice of appeal was filed. The period for filing a notice of appeal is measured from "the date of service" of a decision rather than the date the decision is mailed. In the absence of a certified return receipt card or other evidence establishing when the decision was served, the appeal cannot be dismissed as untimely.

2. Wild Free-Roaming Horses and Burros Act

16 U.S.C. § 1333(b)(2) (1982) contains the sole and exclusive authority for BLM to remove wild horses from the public range. The statutory term "appropriate management level" has a very specific meaning in regard to removing wild horses or burros from the public range. It is synonymous with restoring the range to a thriving natural ecological balance and protecting the range from deterioration. The number of "excess" animals the Secretary is authorized to remove is that which exceeds the appropriate management level, which is the optimum number of wild horses and burros that results in a thriving natural ecological balance and avoids a deterioration of the range.

3. Wild Free-Roaming Horses and Burros Act

An "appropriate management level" established purely for administrative reasons because it was the level of wild horse use at a particular point in time cannot be

> sustained under 16 U.S.C. § 1333(b)(2) (1982). The statute does not authorize the removal of wild horses to achieve an appropriate management level which was established for administrative reasons rather than in terms of the optimum number of animals which results in a thriving natural ecological balance and avoids a deterioration of the range.

APPEARANCES: Craig C. Downer, pro se.

OPINION BY ADMINISTRATIVE JUDGE GRANT

Craig C. Downer has appealed a July 22, 1988, decision of the Nevada State Director, Bureau of Land Management (BLM), approving the Wild Horse Removal (Gathering) Plan for the Sonoma-Gerlach and Paradise-Denio Resource Areas (N 2-88-2). The plan calls for the removal of approximately 1,117 wild horses from five Herd Management Areas (HMA's). Appellant objects to removal of wild horses from two of the five areas -- the Granite Range HMA where 280 horses are to be removed and 176 remain, and the North Stillwater HMA where 107 horses are to be removed and 82 remain. Appellant, a wildlife biologist, states that "the numbers to remain are too low and will result in inbreeding and the decline of the population." Appellant refers to material he previously submitted to the BLM state office as "justifying why I consider such levels as these to be substandard and non-viable." 1/

When BLM forwarded the notice of appeal and the decision record to the Board, it included a cover memorandum from the District Manager discussing the merits of the appeal. There was no indication that the memorandum had been served on appellant. Because 43 CFR 4.27(b) prohibits written communication between a party and the Board concerning the merits of an appeal unless a copy is furnished all parties, we served a copy upon appellant by order dated February 8, 1989. He has responded by a letter received March 24, 1989.

Prior to addressing the substantive issues raised by the appeal, we must consider the assertion in BLM's memorandum that the appeal was not timely filed and should be dismissed. BLM states that a copy of the proposed action was mailed to appellant on August 9, 1988, but that the appeal was not filed in the Winnemucca District Office until September 13, 1988. BLM argues that the appeal was filed beyond the 30 days allowed by 43 CFR 4.411(a).

1/ It is not clear what materials appellant is referring to as they are not included in the record. Cases appealed to the Board are decided based on the administrative record or case file received from BLM and the submissions of the parties on appeal to the Board. See 43 CFR 4.24. Incorporation by reference of documents not filed as a part of the record in the case file at issue will not avail the parties to the extent these documents are not a part of the case file.

[1] The regulation cited by BLM requires that: "A party served with the decision being appealed must transmit the notice of appeal in time for it to be filed in the office where it is required to be filed within 30 days after the date of service." 43 CFR 4.411(a). When a notice of appeal is not timely filed, the Board lacks jurisdiction to consider the merits of the appeal and must dismiss it. Stewart L. Ashton, 107 IBLA 140, 141 (1989); Ahtna, Inc., 100 IBLA 7 (1987).

The regulation, however, measures the period for filing a notice of appeal from "the date of service" of a decision rather than the date the decision is mailed. As a general rule, the regulations provide that where the mails are used to send a notice to a person, receipt will be deemed to have occurred when it is received by him at his last address of record with BLM. 43 CFR 1810.2(b). Thus, it is the date of receipt rather than the date of mailing which initiates the running of the appeal period. See F. Howard Walsh, Jr., 93 IBLA 297 (1986); Joan L. Harris, 37 IBLA 96 (1978).

Further, an appeal will not be dismissed as untimely when the record transmitted with the appeal fails to establish that the decision was "served" upon the appellant more than 30 days prior to the date the notice of appeal was filed. Jean Emanuel Hatton, 107 IBLA 47, 49 (1989); Mobil Oil Exploration & Producing Southeast, Inc., 90 IBLA 173, 174-76 (1986). The present case record contains no certified return receipt card or other evidence indicating when BLM's decision was served on Downer. In the absence of such evidence, we could not dismiss his appeal as untimely.

Finally, in any event, there is no doubt that Downer's appeal was timely filed. BLM's cover letter accompanying the Wild Horse Removal Plan is dated August 9, 1988, which BLM states is also the date it was mailed. Thus, Downer could not have received BLM's decision prior to August 10, 1988. 2/ The envelope in which the notice of appeal was sent to BLM bears a postmark of September 9, 1988, which would have been within the 30-day period for filing an appeal even if the decision had been served on August 10. 3/ The regulations provide a "grace period" for waiver of any delay in filing "if the document is filed not later than 10 days after it was required to be filed and it is determined that the document was transmitted or probably transmitted to the office in which the filing is required before the end of the period in which it was required to be filed." 43 CFR

2/ It is likely that Downer did not receive BLM's decision until some days later. The decision was mailed to appellant at a post office box in Minden, Nevada. In his response to BLM's memorandum, appellant states that the decision "had to be forwarded to me at a distant location," apparently Ellicott City, Maryland. Since delivery to Downer was probably delayed several days by the forwarding, it is very possible that Downer's notice of appeal, which was filed on Sept. 13, 1988, was actually received by BLM within 30 days of the date he was served with BLM's decision.

3/ To determine where the 30-day filing deadline falls, one begins counting the day after the date of service. Luella S. Collins, 102 IBLA 399, 400 (1988). Thus, the filing deadline here was no earlier than Sept. 9, 1988.

4.401(a). Since Downer's notice of appeal was mailed no later than the last day of the 30-day appeal period and received by BLM within 10 days of the earliest date it could have been due, his notice of appeal is properly deemed timely.

The record on appeal consists of a series of documents prepared by BLM which formed the basis for the Wild Horse Removal Plan for the Sonoma-Gerlach and Paradise-Denio Resource Areas. As explained in the removal plan, a land-use plan for the Sonoma-Gerlach and Paradise-Denio Resource Areas was completed in 1982. A portion of the planning process was the preparation of the Sonoma-Gerlach Grazing Environmental Impact Statement which led to the issuance of a Management Framework Plan Step III Decisions document (MFP-III) for the Sonoma-Gerlach Resource Area. The MFP-III was approved by the state director on July 9, 1982. One decision included in the MFP-III was that "[e]xisting/current WH&B [wild horse and burro] numbers (as of July 1, 1982) will be used as a starting point for monitoring purposes" except when one of five specified conditions exist. The MFP-III also lists the existing number of wild horses and burros in 15 subdivisions of the Sonoma-Gerlach Resource Area. Other documents in the record concern the Lahontan Resource Management Plan (RMP) which includes a portion of the North Stillwater HMA.

The Wild Horse Removal Plan challenged by appellant lists the 1988 estimated population of wild horses and burros, the "appropriate management level," and the proposed number to be removed for each of the five HMA's. The next section of the removal plan, titled "Justification," after reporting the decision of the MFP-III and the five conditions, states: "None of the above five conditions are applicable to this proposed plan of removal, and the existing/current numbers (as of July 1, 1982) will be used as a starting point for monitoring purposes."

The Board has previously had occasion to review BLM decisions to remove wild horses from the public range in a similar context. In Animal Protection Institute of America, 109 IBLA 112 (1989), the appellant contended that BLM decisions to remove wild horses had failed to properly determine that an excess number of wild horses was present or that removal was necessary to restore a thriving natural ecological balance and protect the range from the deterioration associated with overpopulation, as required by the Wild Free-Roaming Horses and Burros Act, P.L. 92-195, 85 Stat. 649 (1971), as amended by the Public Rangelands Improvement Act of 1978, P.L. 95-514, § 14, 92 Stat. 1803, 1808-10 (1978) (16 U.S.C. §§ 1331-1340 (1982)), and Dahl v. Clark, 600 F. Supp. 585 (D. Nev. 1984).

[2] Our review of the Act in that case led us to conclude that the provision referred to by the appellant, 16 U.S.C. § 1333(b)(2) (1982), "contains the sole and exclusive authority for BLM to remove wild horses from the public range." Animal Protection Institute of America, supra at 126. That provision states that, when the Secretary of the Interior determines on the basis of information specified in the statute or, in the absence of such information, on the basis of information available to him

that an overpopulation exists on a given area of the public lands and that action is necessary to remove excess animals, he shall immediately remove excess animals from the range so as to achieve appropriate management levels. Such action shall be taken * * * until all excess animals have been removed so as to restore a thriving natural ecological balance to the range, and protect the range from the deterioration associated with overpopulation[.]

16 U.S.C. § 1333(b)(2) (1982).

In examining this statute we also concluded that the statutory term "appropriate management level" (AML) has a very specific meaning in regard to removing wild horses or burros from the public range. "It is synonymous with restoring the range to a thriving natural ecological balance and protecting the range from deterioration." Animal Protection Institute of America, supra at 118. Thus, the number of "excess" animals the Secretary is authorized to remove is that which exceeds the AML, which is the optimum number of wild horses and burros that "results in a thriving natural ecological balance and avoids a deterioration of the range." 109 IBLA at 119; see 16 U.S.C. § 1332(f) (1982). The court in Dahl v. Clark held that: "[T]he test as to appropriate wild horse population levels is whether such levels will achieve and maintain a thriving ecological balance on the public lands." 600 F. Supp. at 595.

The record before us in Animal Protection Institute of America indicated that the AML's used as a basis for the removal actions approved by the BLM decisions had been established as a result of directions contained in Instruction Memorandum (I.M.) No. NV-82-305 issued by the Nevada State Director on June 8, 1982. Id. at 115-16; see also Dahl v. Clark, supra at 589-90. The I.M. set forth a series of "conditions" for determining the numbers for wild horses and burros used in developing land-use plans. It stated that, if none of the conditions "are applicable in establishing a starting point for monitoring, the current wild horse and burro numbers will be used." Animal Protection Institute of America, supra at 116-17.

[3] We found that in most instances the decisions on appeal had taken the previously current wild horse and burro population statistics set forth in land-use plans and other documents and made them the AML's to which wild horse herds were to be reduced by the proposed removal actions. We concluded that BLM had originally used the then-current numbers for reasons of administrative convenience because information on which to otherwise establish numbers was either lacking or considered inadequate. Id. at 118. Because of the specific meaning the term AML has under 16 U.S.C. § 1333(b)(2) (1982), we held that "an AML established purely for administrative reasons because it was the level of wild horse use at a particular point in time cannot be justified under the statute." Id. Accordingly, we also held that "the Act does not authorize the removal of wild horses in order to achieve an AML which has been established for administrative reasons, rather than in terms of the optimum number which results in a thriving natural ecological balance and avoids a deterioration of the range." Id. at 119.

It is clear that the AML's in the decision now on appeal were also taken from land-use planning documents and other documents which adopted the then current wild horse and burro population numbers for reasons of administrative convenience. The AML's for the Granite Range, Calico Mountains, and Fox and Lake Range HMA's are identical to the population figures set forth in the RMP-III. The AML for the North Stillwater HMA is the sum of the RMP-III number and that found in the Lahontan RMP. Accordingly, we find that we are bound by our prior holding in Animal Protection Institute of America, supra, and, hence, we set aside and remand the decision appealed from.

As in our prior decision, the problem we perceive in the case before us is not that BLM chose to use, for reasons of administrative convenience, then current population statistics in its land use plans, the RMP-III, or the other documents prepared prior to issuing a decision to remove wild horses. The Act requires BLM to maintain an inventory of wild horses and burros. 16 U.S.C. § 1333(b)(1) (1982). Consistent with this, the RMP-III used current numbers "as a starting point for monitoring purposes." Rather, the problem is that BLM's decisions to remove wild horses converted these numbers into AML's. Inventory numbers chosen for administrative convenience as a starting point for monitoring purposes are not AML's within the statutory meaning of the term. As stated in the statute, the purpose for maintaining an inventory is to allow the Secretary to

> make determinations as to whether and where an overpopulation exists and whether action should be taken to remove excess animals; determine appropriate management levels of wild free-roaming horses and burros on these areas of the public lands; and determine whether appropriate management levels should be achieved by the removal or destruction of excess animals or other options (such as sterilization, or natural controls on population levels). [Emphasis supplied.]

16 U.S.C. § 1333(b)(1) (1982). The inventory is to provide information which, along with other information gathered from monitoring and studies (see 16 U.S.C. § 1333(a), (b)(1), (b)(3) (1982)), will allow the Secretary to determine the optimum number of wild horses and burros that will allow a thriving natural ecological balance and protect the range from deterioration. The inventory itself does not constitute that determination.

Because we find the AML's in BLM's decision to be improper, we need not address appellant's argument as to viable herd populations. As BLM appears to recognize, the size of a herd necessary to maintain a viable population is relevant to the determination of AML's. Included in the record submitted to the Board is Information Bulletin (I.B.) No. 88-144 which includes the report of a study of "Wild Horse Parentage and Population Genetics" made under contract from BLM. The I.B. states that the report is "being forwarded to the National Academy of Science's Committee on Wild and Free-Roaming Horses and Burros for review and interpretation" and that the review should "result in recommendations on the application of these results to herd management."

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is set aside and the case is remanded.

C. Randall Grant, Jr.
Administrative Judge

I concur:

David L. Hughes
Administrative Judge